84-556

No.

Office-Supreme Court, U.S.
FILED
OCT 5 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

AMERICAN SECURITY COUNCIL
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,

and

UNITED STATES OF AMERICA,
Respondents,

CBS, INC.,
Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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October 5, 1984

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QUESTIONS PRESENTED*

1. Whether the refusal of CBS to substantively respond to a legitimate inquiry and complaint from a member of the public was consistent with its duties as a public trustee or with its responsibilities under the Fairness Doctrine.

2. Whether the repeat showing by CBS of a program containing erroneous and misleading information without correction of such material of which they had previously been put on notice is consistent with its duties as a public trustee or with its responsibilities under the Fairness Doctrine.

3. Whether the Federal Communications Commission has adopted a *de facto* policy against granting substantive analysis and relief under the Fairness Doctrine.

4. Whether in the absence of Congressional concurrence and in view of this Court's Opinion in *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367 (1969), the Federal Communications Commission has the authority, *de jure* or *de facto* to fail to observe and implement the Fairness Doctrine.

5. Whether the Fairness Doctrine reduces or enhances free speech.

6. Whether the Fairness Doctrine is an essential and necessary protection and remedy for the general public or whether it has been rendered "obsolete" by the advent of increased technology in media.

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*All parties to this proceeding are identified in the caption hereof.

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The American Security Council (ASC) hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case. The Decision of the court below affirmed the Decision of the Federal Communications Commission in refusing to consider Petitioner's fairness doctrine complaint against CBS, Inc.

OPINIONS BELOW

The judgment of the Court of Appeals below (App B) was issued without opinion and has not yet been reported.

The Memorandum, Opinion and Order of the Federal Communications Commission (App C) which was affirmed by the Court below has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on April 20, 1984. A timely petition for rehearing *en banc* was denied on June 15, 1984, and a timely motion for extension of filing date for this Petition to October 5, 1984 was filed with this Court on September 6, 1984 and granted by the Court's Order September 11, 1984. This Court's jurisdiciton is invoked under 28 U.S.C. 1254(1) and 2350(a).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

This case directly involves interpretations of the First Amendment to the Constitution of the United States and Section 315(a) of the Communications Act of 1934, 48 Stat. 1088, as amended, 47 U.S.C. 315(a), both of which are set forth in Appendix F. To the extent that the reviewing court failed to compel agency action unlawfully withheld, this case also involves Section 706 of the Administrative Procedure and Judicial Review Act, 80 Stat. 393, 5 U.S.C. 706, which is also set forth in Appendix F.

STATEMENT OF THE CASE

The American Security Council (ASC) is a long established non-profit public service institution whose purpose is to improve public understanding of facts and issues re-

lating to the national security of this country. In general, the members of ASC share a common concern that a strong national security of the United States is the most effective deterrent to war and the best method to assure continued peace.

In early June of 1981, CBS undertook an extensive advertising campaign to promote the presentation of a special program series which was to consist of a total of five hours to be presented one hour per night in "prime time" during the week of June 14. The program was entitled *The Defense of the United States* and purported to be a definitive analysis and study of all relevant aspects of the current defense posture of this country. In view of the fact that this subject matter was precisely the area of expertise of ASC, the petitioner as an organization, and John M. Fisher as an individual and as President of ASC, took a very serious interest and viewed the program very closely when it was presented.

Subsequent to its presentation, ASC concluded that although there was some value in the program to the extent that it treated a very timely subject that deserves exposure and serious consideration by the people of this nation, this value was seriously diminished by not only a perceived "slant" of presentation to the position that the country already has more defense capability than it needs (precisely opposite to the position held by ASC) but that it also contained serious and demonstrable errors of fact in several very substantive areas.

Accordingly, on June 23, 1981, shortly after original presentation of the program, ASC wrote a seven-page letter to CBS (App. E at p. 67a), congratulating them on the attention they had paid to the issue but pointing out the bias perceived in the program as well as the several specific

factual errors[1] noted, and requesting that CBS undertake a further program effort to orrect both the factual errors and the overall bias of the program as presented by them. Shortly thereafter, ASC received a two-paragraph response from CBS News avoiding any discussion of the substance of the complaint and simply stating their own general conclusion that they did a good job. (App. E at p. 77a)

Notwithstanding having been put on notice as to misinformation and errors in the program as *originally* presented, CBS then proceeded to *repeat* the program with no correction on the evenings of August 3, 4, 5, 6, & 7, 1981. ASC *again* sought some voluntary relief from CBS[2] subsequent to that repeat presentation of the program and *again* received a very curt two-paragraph rejection and continued refusal to respond to any of the substantive issues raised.

On May 26, 1982, ASC filed a formal Fairness Doctrine complaint with the Federal Communications Commission stating in full detail the essential elements of the complaint, (including the unsuccessful efforts it had undertaken to seek a voluntary dialogue and resolution of the problem with CBS) and an appropriate request for relief

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[1]The most egregious factual error appeared in Part I where CBS presented two experts to describe the effects and survivability of a nuclear explosion. Both "experts" were longtime members and leaders of pacifist and nuclear disarmament groups (although this fact was not revealed or disclosed by CBS) and their description of the chances of survivability or the value of individual or collective civil defense clearly reflected their pessimistic bias (by e.g. overstating the destructive force of a nuclear explosion by over *100 times* its *actual* effect and by grossly understating the positive results of protective action taken by the civilian population in the World War II raids on Hamburg, Germany.)

[2]The entire exchange of letters is contained in Appendix E at pp. 67a to 81a.

and assistance from the Commission under the Fairness Doctrine. (App. E)

Despite the fact that the complaint and facts stated therein were also supported by the affidavit of John M. Fisher (*not* a required element for a fairness doctrine complaint), the FCC not only refused to grant relief but also refused to even ask CBS to file any response or comments upon the allegations in the complaint (see App. C at p. 18a). Following receipt of the staff ruling, ASC on October 6, 1982, filed an Application for Review with the full Commission requesting review and reversal of the staff action (App. D). On June 23, 1984 the Application for Review was considered by the full Commission in open meeting and after some misgivings were indicated by at least one commissioner,[3] the proposed Memorandum, Opinion and Order rejecting the ASC complaint was returned to the staff for some "revision" and was finally released on July 12, 1984.[4] On August 10, 1983, ASC noted its Petition for Review, CBS was subsequently granted permission to participate as an Intervenor and appropriate briefs were filed by all parties. On April 13, 1984, after comple-

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[3]Commissioner Rivera indicated that although he had reviewed the FCC's *Fairness Report*, 48 FCC 2d 1 (1974), setting forth rules to be followed in Fairness Complaints, even he wasn't sure where ASC was held to have been deficient

> . . . What must this complainant do. It seems that you and I understand that in this area we parse things very finely and thinly but I must tell you I have a real problem with your [the FCC staff] analysis here and I see a very, very fine line between what they said and what you are asking them to do. . .

[4]Apparently one of the major additions to the original document was the citation to the case of *John Howard*, 55 FCC 2d 777 (1975) which while meant to *buttress* the Commission's decision has been referred to by ASC in its Brief for Petitioner as being so *patently* inapposite as to illustrate a different point, i.e., the lengths to which the FCC will go to seek to *deny* a Fairness Doctrine complaint.

tion of all briefs but prior to oral argument held on April 17, ASC filed with the Court of Appeals a Motion to Apprise Court of Recent Developments to inform the court that the FCC on April 12, 1984 issued a News Release announcing its intention to initiate a "comprehensive inquiry to reassess [the Commission's] policy of imposing general fairness doctrine obligations on broadcast licensees."[5] ACS also pointed out to the court that the FCC was now *openly* questioning whether it was *required* by statute to observe the fairness doctrine or if it could use its own "discretion" to "modify" the fairness doctrine.

At oral argument, ASC continued to stress its position that it had clearly met all procedural rules necessary for substantive consideration of a complaint filed under the Fairness Doctrine, that the actions of CBS were inconsistent with its own obligation as a licensee to respond seriously to serious complaints, and that in failing to grant relief or to even request comments or any response from CBS to the complaint that the FCC had condoned the action of CBS and avoided its *own* obligation to observe and enforce the fairness doctrine as a remedy for the public. ASC also suggested that since the fairness doctrine was the only and exclusive remedy available to the public at large (other than private lawsuits for private defamation) that loss or non-adherence to this remedy would leave the public with *no* remedy at all, no matter how egregious the broadcaster's violation might be.

The court subsequently rejected ASC's arguments and issued its Judgment without opinion affirming the FCC's Decision and rejecting the ASC Complaint.

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[5]FCC News Release No. 33937, July 23, 1980. The full text of the *Notice of Inquiry,* FCC 84-140, was subsequently released on May 8, 1984.

REASONS FOR GRANTING THE WRIT

The Decision Below is in Conflict with the Statutory Requirements of 47 U.S.C. 315(a) and the Decision of this Court in *Red Lion Broadcasting Co. v. FCC* and is of substantial importance in determining the responsibilities, rights and duties of broadcasters to the public under the First Amendment to the U.S. Constitution.

Unlike the print media, broadcast facilities have been by their very nature both limited and valuable properties. Since left unregulated they would cause electrical interference with each other, they have been subject to Federal regulation since the *Federal Radio Act of 1927* which was subsequently replaced by the *Communications Act of 1934* (47 USC Sec. 151-609) under which communications have been regulated to the present time. Under the general mandate of that Act it has been recognized that not everyone who desires a radio or television facility may have one, that licenses for the use of such frequencies were to be issued by the Federal Communications Commission to applicants meeting the necessary qualifications set by the Act and the Commission, and that those receiving such licenses would have no "property right" in them but would be required to operate as a trustee of the public in the public interest, convenience and necessity and to periodically seek renewal of such licenses. (see Section 307 of the *Act, supra*)

Consistent with that general public interest mandate, the Commission first stated the term of "fairness" required of broadcasters in 1949 in its *Report on Editorializing by Broadcast Licensees,* 913 FCC 1246, where it held that "broadcast coverage of issues of public importance must be adequate and must fairly reflect differing viewpoints." Although the concept was initiated by the Commission

itself, under the general "public interest" mandate, the U.S. Congress used the same "fairness" language when it amended Sec. 315(a) of the Communications Act in 1959.[6] Finally, in 1969 this Court in *Red Lion Broadcasting Company v. FCC*, 395 US 367, specifically reviewed the 1959 Congressional Amendment of the Communications Act and upheld the constitutionality of the fairness doctrine as set forth therein, stating the following:

> There is nothing in the First Amendment which prevents the Government from requiring a licensee to share frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airways.

and further:

> That Congress in 1959 [intended] that the phrase "public interest," which had been in the Act since 1927, imposed a duty on broadcasters to discuss both sides of controversial public issues. In other words, the amendments vindicated the FCC's general view that the Fairness Doctrine inhered

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[6]At that time the Congress added the following language to the Communications Act:

> Nothing in the foregoing sentence [exempting certain news programming from the equal time requirements for qualified candidate broadcasts] shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance. Pub. L. 86-274 Sec. 1, 73 Stat. 557.

in the public interest standard. *Red Lion,* supra at 380.

As of the date that *Red Lion* was decided, therefore, the Fairness Doctrine had been initiated by the FCC (in 1949), codified by the U.S. Congress (in 1959) and upheld by this Court (in 1969). Although Petitioner is unaware of any act subsequently taken by the Congress or by this Court *contrary* to those cited above,[7] and the Fairness Doctrine remains "on the books" now as it did then, it has become the object of such abuse and scorn by the very agency that is charged with implementing its terms, and to such a degree, that it appears to be virtually non-existent as a law or remedy today.

It is axiomatic that the very concept of the fairness doctrine was created for the benefit and protection of the *public,* against the occurrence of any demonstrably unfair practices of broadcasters, taking special note of the fact that broadcasters stood in a special position as trustees of valuable and powerful *public* airwaves. While petitioner by no means suggests that the role of the FCC and the broadcasters that it regulates must in any way be adversarial in nature, we also would suggest that it should not project an 'old-boy' image of the FCC *and* the broadcasters allied *against* the public. Unfortunately, in the case of the Fairness Doctrine that is *exactly* what we see.

As a former broadcaster himself, the present Chairman of the Commission has gone out of his way to show himself as the personal champion of the broadcasters in rid-

[7]In fact, the Court appeared to *affirm* the concept of the fairness doctrine as recently as 1978 in *FCC v. National Citizens Committee for Broadcasting,* 436 U.S. 775.

ding them of their fairness doctrine obligation.[8] Nor has the Chairman stopped at mere rhetoric in his zeal to dismantle the fairness doctrine. Under his leadership the FCC in 1981 formally requested the U.S. Congress to repeal Sec. 315 of the *Communications Act,* including the fairness doctrine[9] and, failing any success there, the Commission has simply followed such a stringent policy in "enforcing" the fairness doctrine that in a *de facto* sense, it simply does not enforce it at all.[10]

Not content with that, the Commission on May 8, 1984 issued a *Notice of Inquiry*[11] to determine how far *it* could go in *officially* dismantling the fairness doctrine *without* congressional approval. Not surprisingly, having issued

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[8]See, for example, the speech of Chairman Fowler to the National Radio Broadcasters Association in September of 1982 where he proposed "no fairness doctrine, no content guidelines, no political speech rules, zip." (reprinted in *Radio and Records,* September 17, 1981; the feature column by Chairman Fowler that appeared on page A-27 in the July 1, 1982 *Washington Post;* and the feature story on page 70 in *USA Today,* October 4, 1982 where he suggested that

> "[if Broadcasters paid a spectrum fee], then Congress would be encouraged to stop thinking of broadcasters as "public trustees" who are subject to all sorts of government interference on behalf of the 'public interest'."

[9]FCC News Release, "FCC Sets Forth Proposal for Amending Communications Act," September 17, 1981.

[10]In Paragraph 19 of its 1974 *Fairness Report* (48 FCC 2d 1), the Commission stated that while it relied upon "complaints received from interested citizens" it would act to spare broadcasters from the necessity of responding to idle or capricious complaints that did not present some *prima facie* evidence of a violation. At that time it noted that in 1973, out of 2306 complaints, it asked for broadcaster *comments* only 94 times. Since that time, the Commission's concern in sparing broadcasters the "burden" of even *commenting* on complaints has become virtually total.

[11]*Notice of Inquiry* in Docket No. 84-282, FCC 84-140.

the notice of "inquiry" the Commission's professional staff has *already* undertaken an overt lobbying effort with the broadcasters, *which it is supposed to regulate,* and who would be the obvious beneficiaries of repeal.[12] The question occurs that if the Commission represents the interests of the broadcasters, then who represents the interests of the public?

The Instant Case Illustrates the Commission's Avoidance of its Statutory Duty to Enforce the Fairness Doctrine.

In this case, the petitioner tried repeatedly to initiate some discussion with CBS and to seek some reasonable response to the specific complaint it had stated. CBS did not respond to such inquiries as a "trustee" but as an arrogant media power that apparently believed that it did not have to answer to anyone for anything. The Commission in denying the complaint strained itself to claim that the peti-

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[12]See, for example, the speech by James C. McKinney, Chief of the Mass Media Bureau of the FCC (and, like the chairman, a former broadcaster) to the West Virginia Association of Broadcasters, August 17, 1984, where he decried the burden of the fairness doctrine and stated:

> In closing today I would challenge you [the broadcasters] to consider why it is that the Commission *is leading* the local broadcasters on this issue – re-examination of the fairness doctrine. (emphasis supplied)

and after referring to other recent "successes" in deregulating broadcasting,

> . . . this is not the time to take it easy. The Commission has fired the starting gun but the industry must run the race. We cannot run it for you.

Address to the West Virginia Association of Broadcasters, by James C. McKinney, text printed and made available by the Federal Communications Commission, August 17, 1984.

tioner and its president had not established to the Commission's satisfaction that they were "regular viewers" despite the fact that the President of petitioner included an affidavit attesting to the fact and that the existence and special interest and expertise of petitioner is well known to the Commission.[13] To the extent that the present case vividly illustrates the utter frustration and futility of any member of the public in seeking relief under the fairness doctrine it underscores the very fact that such relief simply does not exist anymore in any practical sense and that those brave or foolish enough to go forward in seeking such relief from the Commission are simply wasting their time and money.

The Effect Upon the Entire Public of this Country.

For private defamation, there is obviously a forum and a remedy available for those who can afford it in State and Federal Courts.[14] For broadcasts that are biased, slanted, or grossly misleading, but *not* defamatory, there is *no*

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[12]See for example *American Security Council Foundation v. FCC,* 63 FCC 2d 366 (1977), aff'd 197 U.S. App. D.C. 124, 607 F.2d 438 (1979) *en banc,* cert. denied, 444 U.S. 1013 (1980). Note also that in addition, in the instant case, the President of this long-established and recognized public interest organization executed a sworn statement as to their viewing habits. The FCC sought to rely upon the Commission's earlier rejection of an arguably frivolous case (where the complainant had first *admitted* that he *didn't* view the requisite programs and then *after* rejection of his complaint by the FCC said that he *was* a regular viewer but *again* admitted he did *not* view the required programs, *John Howard* 55 FCC 2d 777) to avoid substantive consideration in *this* case.

[14]A course currently being followed by General William Westmoreland against CBS for alleged deficiencies in the CBS program, *The Uncounted Enemy: a Vietnam Deception,* which was presented in early 1982, some months subequent to *The Defense of the United States* and which has been alleged to contain the same type of biased and misleading material as in the present case.

remedy *but* the fairness doctrine. Without the fairness doctrine there would be *no* remedy, no matter how egregious the violation of journalistic standards, honesty and basic fair play.

Notwithstanding the predictable damage of such disinformation left uncorrected, there are those who would claim that there is such an amount of additional broadcast media available that such a problem without a remedy would somehow now be "acceptable." To those that advance the claim that with the advent of cable and satellite television technology there is no longer any "scarcity" of facilties we would first note that there are many areas of this country where such wonderful new media do not exist at *all* and that even in areas where other choices may be available there are vast numbers of people who do not have the financial ability to go beyond "free" television to *purchase* or avail themselves of these new services.

In addition, we would note our agreement with CBS Board Member and ex-FCC Chairman, Newton Minnow, who recently rejected the claim that there was no longer a "scarcity" of stations sufficient to provide grounds for regulation of broadcasting under the First Amendment, stating that

> The test of scarcity is not by reference to the number of newspapers. The test is the number of citizens who want a broadcast license and are unable to obtain one. . . Unfortunately, scarcity still exists.
>
> (*Communications Daily,* Dec. 1, 1983)

We would further suggest that the impact of broadcasting and, more specifically, the impact of *television* broadcasting remains unparalleled in our society today for its weight and importance in affecting and shaping opinion

and ideas.[15] When CBS decided to explain the effects of a nuclear explosion and the pros and cons of individual civil defense by presenting two dedicated anti-nuclear pacifist activists, by *any* definition of fairness it was duty-bound to disclose that fact, but it did not. When they presented erroneous and misleading factual material in that program, it caused harm that is even now incalculable to the degree that vast numbers of people who received that information from a trusted major network *continue* to rely upon it now in reaching decisions affecting the lives and well-being of themselves and their families.

Up to that point, CBS might be forgiven for a mistake or bad judgment that anyone could make. When they ignored the chance to correct it, when they disdained the members of the public trying to help correct the error, when they deliberately *repeated* the misinformation, the remedy of the fairness doctrine *should* have taken effect to call them to account and to correct the record. To the extent that CBS ignored its obligation to the public and to its own audience it was wrong and still should be required to

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[15]As stated by Tony Schwartz, a top advertising agency executive quoted on "The 30-Second President" segment of a "Walk through the 20th Century" recently aired on PBS:

> I think that television has restructured the way we shop, the way we learn, the way we entertain ourselves and just all the important things in our lives have been restructured by television . . . . We find that the political parties are no longer the communications force in politics . . . the networks are. You might say the three parties are ABC, NBC and CBS.

Mr. Schwartz is in a position to speak with authority on this point. In addition to commercial successes, Mr. Schwartz was responsible for the "Daisy" political commercial aired just once during the Goldwater presidential campaign but which remains one of the most famous political advertisements ever presented, and very well illustrates the awesome power of the medium.

answer for its actions. Far worse in our judgment is the FCC that avoided its *own* statutory obligation to act upon the complaint and at the very *least* ask CBS to respond to those serious charges and allegations.

CONCLUSION

In *Federal Communications Commission v. League of Women Voters of California, et al.*,[16] this Court (in footnotes 11 and 12) recognized that "Critics, including the incumbent Chairman of the FCC" have charged that there is now so much media that the concept of "scarcity" of broadcast media (and therefore the fairness doctrine concept and rationale) is obsolete and that the fairness doctrine may now be impeding rather than furthering First Amendment objectives. We strongly disagree with those views and respectfully submit that the instant case vividly illustrates the use of media power without the responsibility that the fairness doctrine is supposed to assure. In any event we would suggest that if the public is to be stripped of this last minimal remedy against broadcast misinformation and bias presented over the *public's* airwaves, that it should be done in the open and by someone with the jurisdiction to make that decision. The Congress seems to be very disinclined to do so. If this Court determines that the fairness doctrine has indeed become "obsolete," that it is more of a burden than a furtherance of the objectives of the First Amendment, then clearly this Court could do so. The one interested party that can *not* do so, that does not have the power or jurisdiction to "delete" the fairness doctrine is the Federal Communications Commission, and yet we would respectfully suggest that in this area that Agency

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[16] ___ U.S., ___, Slip Opinion 82-912, decided July 2, 1984.

has arrogated to itself that very action and to the degree that the fairness doctrine has *already* been deleted in a *de facto* sense by the FCC, it has done so without the knowledge or concurrence of the public, the Congress or this Court.

We would respectfully submit that grant of this Petition for Certiorari would correct that condition, that consideration and decision of this case would impact on the rights and expectations of every citizen of this country and that grant of this Petition would therefore be in the public interest.

Respectfully submitted,

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October 5, 1984